

§ 4044.3

29 CFR Ch. XL (7–1–11 Edition)

highest year. This is also known as the “insurance age.”

(d) For purposes of §§ 4044.55 through 4044.57:

Monthly benefit means the guaranteed benefit payable by PBGC.

(e) For purposes of §§ 4044.71 through 4044.75:

Lump sum payable in lieu of an annuity means a benefit that is payable in a single installment and is derived from an annuity payable under the plan.

Other lump sum benefit means a benefit in priority category 5 or 6, determined under subpart A of this part, that is payable in a single installment (or substantially so) under the terms of the plan, and that is not derived from an annuity payable under the plan. The benefit may be a severance pay benefit, a death benefit or other single installment benefit.

Qualifying bid means a bid obtained from an insurer in accordance with § 2617.14(b) of this chapter. (See Note at beginning of part 4044.)

[61 FR 34059, July 1, 1996, as amended at 67 FR 16959, Apr. 8, 2002; 74 FR 11035, Mar. 16, 2009]

EFFECTIVE DATE NOTE: At 76 FR 34605, June 14, 2011, § 4044.2 was amended by removing “annuity, basic-type benefit” and adding in its place “annuity, bankruptcy filing date, basic-type benefit” and by removing “nonforfeitable benefit, normal retirement age” and adding in its place “nonforfeitable benefit, non-PPA 2006 bankruptcy termination, normal retirement age” in paragraph (a); amending the definition of “non-trusted plan” by removing “receives a Notice of Sufficiency from PBGC and” and “in accordance with part 2617 of this chapter. (See Note at the beginning of part 4044.);”; removing the definition of “notice of sufficiency”; and amending the definition of “valuation date” by removing “date of termination” and adding in its place “termination date” in paragraph (b); and removing the definition of “qualifying bid” in paragraph (e). These amendments became effective July 14, 2011.

§ 4044.3 General rule.

(a) *Asset allocation.* Upon the termination of a single-employer plan, the plan administrator shall allocate the plan assets available to pay for benefits under the plan in the manner prescribed by this subpart. Plan assets available to pay for benefits include all plan assets (valued according to § 4044.41(b)) remaining after the sub-

traction of all liabilities, other than liabilities for future benefit payments, paid or payable from plan assets under the provisions of the plan. Liabilities include expenses, fees and other administrative costs, and benefit payments due before the allocation date. Except as provided in § 4044.4(b), an irrevocable commitment by an insurer to pay a benefit, which commitment is in effect on the date of the asset allocation, is not considered a plan asset, and a benefit payable under such a commitment is excluded from the allocation process.

(b) *Allocation date.* For plans that close out pursuant to a Notice of Sufficiency under the provisions of subpart C of part 2617 of this chapter, assets shall be allocated as of the date plan assets are to be distributed. For other plans, assets shall be allocated as of the termination date. (See Note at beginning of part 4044.)

EFFECTIVE DATE NOTE: At 76 FR 34605, June 14, 2011, § 4044.3(b) was amended by removing “pursuant to a Notice of Sufficiency under the provisions of subpart C of part 2617 of this chapter” and adding in its place “under § 4041.28 or § 4041.50” and by removing “(See Note at beginning of part 4044.).”. These amendments became effective July 14, 2011.

§ 4044.4 Violations.

(a) *General.* A plan administrator violates ERISA if plan assets are allocated or distributed upon plan termination in a manner other than that prescribed in section 4044 of ERISA and this subpart, except as may be required to prevent disqualification of the plan under the Code and regulations thereunder.

(b) *Distributions in anticipation of termination.* A distribution, transfer, or allocation of assets to a participant or to an insurance company for the benefit of a participant, made in anticipation of plan termination, is considered to be an allocation of plan assets upon termination, and is covered by paragraph (a) of this section. In determining whether a distribution, transfer, or allocation of assets has been made in anticipation of plan termination PBGC will consider all of the facts and circumstances including—

(1) Any change in funding or operation procedures;

(2) Past practice with regard to employee requests for forms of distribution;

(3) Whether the distribution is consistent with plan provisions; and

(4) Whether an annuity contract that provides for a cutback based on the guarantee limits in subpart B of part 4022 of this chapter could have been purchased from an insurance company.

ALLOCATION OF ASSETS TO BENEFIT CATEGORIES

§ 4044.10 Manner of allocation.

(a) *General.* The plan administrator shall allocate plan assets available to pay for benefits under the plan using the rules and procedures set forth in paragraphs (b) through (f) of this section, or any other procedure that results in each participant (or beneficiary) receiving the same benefits he or she would receive if the procedures in paragraphs (b) through (f) were followed.

(b) *Assigning benefits.* The basic-type and nonbasic-type benefits payable with respect to each participant in a terminated plan shall be assigned to one or more priority categories in accordance with §§ 4044.11 through 4044.16. Benefits derived from voluntary employee contributions, which are assigned only to priority category 1, are treated, under section 204(c)(4) of ERISA and section 411(d)(5) of the Code, as benefits under a separate plan. The amount of a benefit payable with respect to each participant shall be determined as of the termination date.

(c) *Valuing benefits.* The value of a participant's benefit or benefits assigned to each priority category shall be determined, as of the allocation date, in accordance with the provisions of subpart B of this part. The value of each participant's basic-type benefit or benefits in a priority category shall be reduced by the value of the participant's benefit of the same type that is assigned to a higher priority category. Except as provided in the next two sentences, the same procedure shall be followed for nonbasic-type benefits. The value of a participant's nonbasic-type benefits in priority categories 3, 5, and 6 shall not be reduced by the value of the participant's nonbasic-type benefit

assigned to priority category 2. Benefits in priority category 1 shall neither be included in nor subtracted from lower priority categories. In no event shall a benefit assigned to a priority category be valued at less than zero.

(d) *Allocating assets to priority categories.* Plan assets available to pay for benefits under the plan shall be allocated to each priority category in succession, beginning with priority category 1. If the plan has sufficient assets to pay for all benefits in a priority category, the remaining assets shall then be allocated to the next lower priority category. This process shall be repeated until all benefits in priority categories 1 through 6 have been provided or until all available plan assets have been allocated.

(e) *Allocating assets within priority categories.* Except for priority category 5, if the plan assets available for allocation to any priority category are insufficient to pay for all benefits in that priority category, those assets shall be distributed among the participants according to the ratio that the value of each participant's benefit or benefits in that priority category bears to the total value of all benefits in that priority category. If the plan assets available for allocation to priority category 5 are insufficient to pay for all benefits in that category, the assets shall be allocated, first, to the value of each participant's nonforfeitable benefits that would be assigned to priority category 5 under § 4044.15 after reduction for the value of benefits assigned to higher priority categories, based only on the provisions of the plan in effect at the beginning of the 5-year period immediately preceding the termination date. If assets available for allocation to priority category 5 are sufficient to fully satisfy the value of those benefits, assets shall then be allocated to the value of the benefit increase under the oldest amendment during the 5-year period immediately preceding the termination date, reduced by the value of benefits assigned to higher priority categories (including higher subcategories in priority category 5). This allocation procedure shall be repeated for each succeeding plan amendment within the 5-year period until all plan assets available for allocation have